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Recommended Citation

Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism*, 65 Md. L. Rev. 15 (2006)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol65/iss1/4>

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BEYOND MANICHEANISM: ASSESSING THE NEW CONSTITUTIONALISM

LISA HILBINK*

Over the past twenty-five years, the “judicial turn” that began in Europe in the wake of World War II has spread to almost all corners of the globe.¹ In established and emerging democracies alike, parliamentary sovereignty is in decline and constitutional courts with broad powers have become commonplace.² Although the formal introduction of judicial review mechanisms does not necessarily translate to an energetic assertion of judicial authority in all places,³ it is true that in many polities, courts now play an unprecedented role in the policymaking process.⁴

Perhaps not surprisingly, normative responses to the rise of the new constitutionalism among Anglo/American-trained scholars of law and courts have followed the contours of the debate over judicial review in the United States, splitting generally between liberal enthusiasm and democratic dismay. Enthusiasts view courts as an important

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1. See generally MAURO CAPPELLETTI, *JUDICIAL REVIEW IN THE CONTEMPORARY WORLD* (1971); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995).

2. TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* 3 (2003); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1-3 (2004); ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 1 (2000); see Kim Lane Scheppele, *Constitutional Interpretation After Regimes of Horror* 2, 10-11 (Univ. of Pa. Law Sch., Pub. Law & Legal Theory Research Paper Series, Paper No. 05, 2000), available at http://papers.ssrn.com/paper.taf?abstract_id=236219 (discussing the importance of a constitutional judiciary in newly formed democratic governments).

3. E.g., DAVID M. O'BRIEN & YASUO OHKOSHI, *TO DREAM OF DREAMS: RELIGIOUS FREEDOM AND CONSTITUTIONAL POLITICS IN POSTWAR JAPAN* 70-71 (1996); JAVIER ANDRÉS COUSO, *The Politics of Judicial Review in Latin America: Chile in Comparative Perspective* (Spring 2002) (unpublished Ph.D. dissertation, Univ. of Cal., Berkeley) (on file with author).

4. CARLO GUARNIERI & PATRIZIA PEDERZOLI, *THE POWER OF JUDGES* 72, 182-83 (C.A. Thomas ed., 2002); SWEET, *supra* note 2, at 3; RAN HIRSCHL, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J. LAW & JURIS. 191, 191 (2002); Kim Lane Scheppele, *Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)* 30 (Nov. 1, 2001) (unpublished paper presented at a conference on constitutional courts, Wash. Univ.), <http://law.wustl.edu/igls/Conferences/2001-2002/ConstitutionalPapers/Scheppele%20paper.pdf>.

mechanism for protecting citizens' rights and their strengthening thus as a positive step toward securing a meaningful and sustainable democracy.⁵ Opponents see judicial empowerment as a move away from popular self-determination and away from policymaking in the interest of the masses.⁶ While the former tend to idealize judges and the role they play in a constitutional democracy, the latter go to the opposite extreme, vilifying judges as agents of the elite.

In this Essay, I advocate moving beyond this binary perspective, arguing that the nature of the role that judges play in contemporary constitutional democracies depends on a whole host of factors not captured by either the sunny liberal or the skeptical democratic views. Judicial behavior and influence are not constants across constitutionalist systems; they are shaped by numerous factors, including but not limited to the institutional characteristics of the legal and political systems in which judges function, which furnish them (and the citizens and legislators with whom they interact) with particular understandings, incentives, and constraints. Rather than insisting, then, that the global rise of constitutionalism must be a wholesale good or bad thing, we should pay more heed to the variation within the trend and inquire into the different effects that this variation has on political practice and policy outcomes.

To make this argument, I first offer a brief overview of the liberal enthusiast and critical democratic responses to the spread of constitutionalism.⁷ I then provide a brief summary of Ran Hirschl's 2004 book, *Towards Juristocracy*,⁸ which is the only work in this category that seeks to put these normative claims to a rigorous, comparative empirical test.⁹ While I endorse Hirschl's call for methodologically sound research to ground normative assessments, I call into question the sweeping negative conclusions he draws. Those conclusions, I contend, are grounded in assumptions or extrapolations which do not hold across cases, not even the four Hirschl treats in the book. In particular, I take issue with two premises: first, that judges everywhere are removed from and unrepresentative of the wider polity; and second, that judges everywhere are taking over or being handed the reins

5. E.g., RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 24-25 (1990); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997).

6. E.g., ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 1 (2003); HIRSCHL, *supra* note 2, at 162-63; F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY 149 (2000); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9 (1999).

7. See *infra* Part I.

8. HIRSCHL, *supra* note 2.

9. See *infra* Part II.

of government, thereby silencing the voices of the people and their elected representatives. By offering examples of both formal and informal norms that structure the judicial role in a variety of new constitutionalist (NC) countries,¹⁰ I demonstrate that in many places, courts are deeply and explicitly embedded in and contained by the democratic political process. Precisely how such norms, individually or in combination, affect that process and its outcomes remains an open question. What the empirical variety suggests, however, is that the “real nature of twenty-first-century constitutional democracy”¹¹ is far more complex and nuanced than even Hirschl, as a self-styled empirical social scientist, cares to admit.

I. JUDGES: HEROES OR ANTI-HEROES?

Until World War II, most of the world’s democracies rejected judicial review as a peculiar and highly conservative American institution, unacceptable in any polity committed to popular sovereignty. Only government officers whose tenure was subject to electoral control possessed the legitimacy to determine what the law was or to determine any substantive limits thereto. In many cases, this translated to a strong commitment to “parliamentary sovereignty.”¹² However, “[w]hen the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of [fundamental democratic] principles”¹³ Hence, in the “second wave” of global democratization that followed WWII, new constitutions were written to entrench rights principles, and, in places like Italy, Germany, and Japan, courts were empowered to review the decisions of elected officials for compliance with these principles.¹⁴ In the years that followed, the appeal of constitutionalism grew such that by the time the “third wave” of democratization began in the mid-1970s,¹⁵ judicial review had become a central element of new democratic constitutions.¹⁶

10. For the purposes of this Essay, the label NC applies to all countries that have adopted judicial review since 1945.

11. HIRSCHL, *supra* note 2, at 218.

12. I say “many” because there were also presidentialist systems, as in Latin America, where lawmaking power was split between the executive and legislature and often dominated by the former, be it *de jure* or *de facto*.

13. CAPPELLETTI, *supra* note 1, at viii.

14. *Id.* at 48 n.8, 74-76.

15. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 3 (1991).

16. GINSBURG, *supra* note 2, at 6-10; Scheppele, *supra* note 2, at 2.

Notable American liberal theorists responded to these developments with great enthusiasm, encouraging new and old democracies alike to embrace the promise of judicial review and chiding U.S.-based skeptics for being largely indifferent to or out of step with the international trend. For example, Ronald Dworkin, the standard-bearer for active judicial rights protection, made his approval clear when he wrote in 1990 in favor of the incorporation of the European Convention on Human Rights into British domestic law and the empowerment of British judges to interpret and apply it against statutes passed by the parliament.¹⁷ He claimed not only that such incorporation would help cultivate (or re-invigorate) a "culture of liberty" in Britain, but also that it would be in no way incompatible with a correct or "true" understanding of democracy.¹⁸ He wrote:

[T]rue democracy is not just *statistical* democracy, in which anything a majority or plurality wants is legitimate for that reason, but *communal* democracy, in which majority decision is legitimate only if it is a majority within a community of equals [P]olitical decisions must treat everyone with equal concern and respect, that [is,] each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life.

That view of what democracy means is at the heart of all the charters of human rights, including the European Convention. It is now the settled concept of democracy . . . , the mature, principled concept that has now triumphed throughout Western Europe [and] North America.¹⁹

In a similar spirit, Bruce Ackerman claimed that "[t]he Enlightenment hope in written constitutions is sweeping the world" and that the future of liberal democracy looked bright since "when judges intervene, they tend to operate on behalf of internationally-recognized norms of human dignity."²⁰

This celebration of constitutionalism's spread did not go unchallenged, however. Indeed, towards the end of the 1990s, a number of highly skeptical, in some cases downright cynical, works emerged challenging the value of judicial review both in theory and practice.²¹ Re-

17. DWORKIN, *supra* note 5, at 20-23.

18. *Id.* at 1, 35 (emphasis omitted).

19. *Id.* at 35-36.

20. Ackerman, *supra* note 5, at 772, 790-91.

21. E.g., BORK, *supra* note 6; ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 153-54 (2001); HIRSCHL, *supra* note 2; DUNCAN KENNEDY, A CRITIQUE OF ADJUDICA-

viving the older (and in some circles, persistent) concerns about the "counter-majoritarian difficulty"²² or the "gouvernement des juges,"²³ these authors have attacked the liberal enthusiasts as, at best, naïve idealists or, at worst, disingenuous elitists.²⁴ While they accept that rights protection, even beyond that necessary to the democratic process, may be integral to democracy,²⁵ they object to the delegation of the power to define and protect rights to unelected judges. Indeed, they argue that assigning this task to a small set of insulated "experts" is an affront to the most basic principle of democracy: political equality.²⁶

II. A CALL FOR EMPIRICAL RESEARCH

While most of these works build their arguments in the abstract or with a single country as the empirical referent,²⁷ Hirschl's book stands out for its attempt to ground its claims in an explicitly comparative study.²⁸ Taking the liberal triumphalists to task for failing to marshal empirical support for their rosy views, Hirschl offers a critical analysis of the origins and impact of constitutionalization, focusing on four countries: Israel, Canada, New Zealand, and South Africa.²⁹ His central claim is that the proliferation of bills of rights and judicial review around the world does not represent humanitarian progress, but rather the entrenchment of elite domination.³⁰ Constitutionalist reforms reflect "an essentially self-serving agenda" on the part of social and economic elites, who see their prerogatives threatened in the electoral sphere and promote constitutionalization in order to pre-

TION (1997); MORTON & KNOPFF, *supra* note 6, at 149; TUSHNET, *supra* note 6; JEREMY WALDRON, LAW AND DISAGREEMENT 15 (1999).

22. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

23. EDOUARD LAMBERT, LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS (1921).

24. BORK, *supra* note 6, at 2.

25. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-36 (1980) (arguing that judicial review protects minority rights).

26. Waldron even goes so far as to characterize the U.S. Supreme Court as "a nine man junta clad in black robes and surrounded by law clerks." WALDRON, *supra* note 21, at 309.

27. Dahl is an exception as his goal is to try to show how poorly the United States performs on a number of measures of democratic performance. DAHL, *supra* note 21. However, while he discusses judicial review, assessing the independent effect thereof is not his main focus. Bork, who discusses Canada and Israel along with the United States, is also an exception, but he makes no pretense of meeting social scientific standards. BORK, *supra* note 6.

28. HIRSCHL, *supra* note 2.

29. *Id.* at 4, 6.

30. *Id.* at 11.

serve their social and political hegemony in times of change.³¹ How and why does this work? Constitutionalization, Hirschl claims, consists of the “wholesale transfer”³² of fundamental policy decisions to insulated, professional policymaking bodies (courts), which favor those with disproportionate understanding of, access to, and influence on those bodies—i.e., the elites.³³ By removing fundamental political decisions from the hands of elected officials, constitutionalization stunts political debate and deliberation and discourages citizen participation.³⁴ In sum, with the introduction of bills of rights and judicial review, “‘They the Jurists’ are granted an elevated status in determining policy outcomes at the expense of ‘We the People,’ laypersons who make up the vast majority of the populace.”³⁵

These constitute very strong, generalizing claims about the new constitutionalism, all of which Hirschl maintains are bolstered by the empirical evidence he offers in his book, and all of which appear to confirm the views of the skeptical democrats. It is not my primary aim here to challenge the strength of Hirschl’s evidence or take issue with the particular interpretation he offers of the constitutional revolutions in his four cases (though this can and should be done). Rather, in the pages that follow, I seek to problematize some of the more sweeping assumptions and claims that Hirschl, like other democratic skeptics, makes as he steps back from his cases and assesses the “new constitutionalism” in general. Hirschl has, laudably, thrown down the gauntlet regarding the need for public law theorists to ground their arguments in rigorous empirical research. In that spirit, I seek to call readers’ attention to some important empirical variation in NC countries and to suggest areas for further social scientific inquiry.³⁶

31. *Id.* at 99.

32. *Id.* at 222.

33. *Id.* at 12.

34. *Id.* at 186. Moreover, Hirschl maintains that judges will tend to adopt “uninhibited Lockean-style individual autonomy” in their interpretations, throwing support behind neoliberalism and anti-statism, and, thereby, protecting those with power in the private sphere—i.e., the elites. *Id.* at 102, 150-51. I do not address this claim here, although I find it weakly supported by even Hirschl’s own data. See *id.* at 106 tbl.4.2 (providing a table to demonstrate the relatively low success rate of positive and collective rights claims as compared with negative rights claims).

35. *Id.* at 187.

36. I do not claim to offer a systematic treatment of all constitutionalist countries. This Essay is merely suggestive of variables whose effects can and should be rigorously investigated.

III. ARE JUDGES IN NC COUNTRIES INSULATED GUARDIANS?

Hirschl's main argument is based on a stark, albeit partially implicit, distinction between courts as insulated "semiautonomous, professional policy-making bodies,"³⁷ on the one hand, and legislatures as faithful mirrors of the popular will, on the other. Following other skeptical democrats,³⁸ he portrays judges as unrepresentative, unaccountable members (or agents) of the social elite, while implying that elected officials are (or would be, in the absence of constitutionalization) responsive and responsible delegates of average citizens.³⁹ A number of other scholars have challenged the latter part of this formulation, noting the many ways in which public representation can and does break down in the legislature.⁴⁰ In what follows, I question the first part of the claim, arguing that high court judges in many NC countries are not necessarily as insulated and aloof from democratic politics as the skeptical democrats contend.

Hirschl devotes little attention to how judicial selection and tenure work in his four focus cases, much less in other NC countries. He offers the most information about selection and composition of the high court for the Israeli case, and it is to that case that his argument perhaps best applies. As he explains, justices to Israel's high court (in fact, to all of the nation's courts) are appointed by a nine-member appointments committee composed of three sitting high court judges, two representatives from the Israel Bar Association, two members of the Knesset chosen by majority through a secret ballot, and "two ministers, one of whom is the Minister of Justice."⁴¹ Hence, as Hirschl himself notes, the process is formally depoliticized; that is, there is no explicit procedure (be it an institutional rule or informal norm) for achieving any measure of political-party, ethnic, gender, or religious representation on the high court, except for a customary chair reserved for a religious justice, which was, until recently, only honored in the breach.⁴² Not surprisingly, then, the Supreme Court of Israel

37. HIRSCHL, *supra* note 2, at 16.

38. *E.g.*, BORK, *supra* note 6.

39. HIRSCHL, *supra* note 2, at 12.

40. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 1 (1991) (noting that legislation may represent private rather than public interests because of the influence of special interest groups); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (arguing that members of Congress are more interested in re-election than promoting the public good); Paul Frymer & Albert Yoon, *Political Parties, Representation, and Federal Safeguards*, 96 NW. U. L. REV. 977, 981-82 (2002) (noting that federal legislators focus on re-election and maintaining party control rather than representing local concerns).

41. HIRSCHL, *supra* note 2, at 66.

42. *Id.* at 67.

has tended to reproduce itself over the years such that “[o]f the thirty-six judges who served on the Court during the country’s first forty-five years, all were Jews and thirty were Ashkenazi,” and decisions have overwhelmingly favored secularist views.⁴³

The Israeli practice appears to reflect an American-style construction of constitutional law as analogous to ordinary law.⁴⁴ In Israel, as in the United States, the high court has (at least since the introduction of the Basic Laws) a dual function: it has jurisdiction over both ordinary cases and cases involving constitutional questions.⁴⁵ Hence, constitutional law is cast as just another form of law, and constitutional adjudication thus, theoretically, requires from judges no more and no less than ordinary adjudication (statutory interpretation or common-law development). Since all they are (or should be) doing is applying the law, which is a strictly professional or “apolitical” function, whether or not they are representative of the people, in some political sense, is (or should be) irrelevant. This is not the way it works in all other NC countries, however.

In many NC countries, reformers have recognized the deeply political nature of constitutional decisionmaking—that is, the fact that it inescapably involves questions of and choices about political morality⁴⁶—and have established formal institutional mechanisms and/or informal norms to ensure that judges who decide constitutional cases have a (much) higher level of representative legitimacy than do ordinary judges. Indeed, in the NC countries of continental Europe, which share in the civil-law tradition, constitutional courts are often not even considered part of the judiciary. Because of their obvious legislative function,⁴⁷ constitutional courts in the civil-law world have been constructed completely separate from and sometimes in tension

43. *Id.* at 66-67. For an in-depth analysis of how another autonomous, bureaucratic judiciary reproduced conservatism and conformity in the judicial ranks, favoring the traditional elite, see Lisa Hilbink, *An Exception to Chilean Exceptionalism?*, in *WHAT JUSTICE? WHOSE JUSTICE? FIGHTING FOR FAIRNESS IN LATIN AMERICA* 64 (Susan Eva Eckstein & Timothy P. Wickham-Crowley eds., 2003) and Elisabeth Hilbink, *The Politics of Judicial Apoliticism: The Institutional Roots of Judicial Behavior in Chile 1964-2000* (Feb. 1, 2006) (unpublished manuscript on file with author).

44. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 13, 16-18 (1996); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 152-55 (2004).

45. BORK, *supra* note 6, at 111-13.

46. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); see also ROBERT M. COVER, *JUSTICE ACCUSED* 202-07 (1975) (discussing the convergence of law and morality issues facing judges presiding over antislavery cases).

47. Constitutional decisionmaking cannot but involve lawmaking, even if only in a negative sense. See Hans Kelsen, *La Garantie Juridictionnelle de la Constitution*, 44 *REVUE DU DROIT PUBLIC* 197 (1928) (Fr.).

with the ordinary judiciary. While the ordinary judiciary is conceived as a civil service bureaucracy, whose function it is to be the “mouth-piece of the law,”⁴⁸ constitutional courts are (rightly) understood as institutions whose function is fundamentally political (not partisan, but definitely not mechanical or substantively “neutral”).⁴⁹

Because of this understanding, the appointment rules for constitutional courts in the civil-law world allow explicitly for political negotiation and aim at political inclusion.⁵⁰ For example, half of the members of the sixteen-member German Constitutional Court are chosen by a twelve-person Judicial Selection Committee of the Bundestag (lower house).⁵¹ The committee’s membership is determined by proportional representation, and the committee must propose a slate of candidates for up-or-down approval by the Bundestag assembly.⁵² The other eight justices are chosen by the Bundesrat (upper house), composed of delegates from provincial governments, who must approve candidates by a two-thirds vote.⁵³ As Ludger Helms notes, “almost from the very beginning there has been a strong attempt [on the part of the two major parties] at establishing a consociational system of nominating judges to the Court.”⁵⁴ While never perfect, the appointment process has worked to provide rough proportionality in partisan, religious, and geographic representation on the court.⁵⁵ In Italy, too, appointments to the Constitutional Court have long been made through interparty bargaining, and, until 1994, followed a proportional formula (the *lottizzazione*).⁵⁶ Likewise, in

48. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 39 (1969).

49. SWEET, *supra* note 2, at 21-22; Louis Favoreu, *American and European Models of Constitutional Justice*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 105, 118-19 (David S. Clark ed., 1990).

50. Victor Ferreres Comella, *The European Model of Constitutional Review of Legislation: Toward Decentralization?*, 2 INT’L J. CONST. L. 461, 468-69 (2004).

51. DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 21 (1997).

52. *Id.* at 21-22.

53. GRUNDGESETZ [GG] [Constitution] art. 94(1); Gesetz über das Bundesverfassungsgerichts [Federal Constitutional Court Act], Mar. 12, 1951 BGBl.I at 243, §§ 5-7; KOMMERS, *supra* note 51, at 21-22.

54. Ludger Helms, *The Federal Constitutional Court: Institutionalising Judicial Review in a Semisovereign Democracy*, in *INSTITUTIONS AND INSTITUTIONAL CHANGE IN THE FEDERAL REPUBLIC OF GERMANY* 84, 87 (Ludger Helms ed., 2000).

55. See Brent Wible, *Filibuster v. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL RTS. J. 897, 936 (2005) (noting that the German Constitutional Court appointment process has led to a stable, politically diverse court). There has also been a recent push to appoint more women to the court. Helms, *supra* note 54, at 88-89.

56. COST. art. 135; MARY L. VOLCANSEK, *CONSTITUTIONAL POLITICS IN ITALY: THE CONSTITUTIONAL COURT* 23 (2000).

Hungary, whose post-Communist reformers followed closely the German model, Constitutional Court nominations are handled by a committee composed of one representative from each party in parliament, and appointment requires two-thirds approval by the full assembly.⁵⁷ The political parties are thus the principal players in Constitutional Court appointments.⁵⁸ The same can be said for Spain, where eight of the twelve members of the Constitutional Tribunal are selected by the legislature (four by the Senate and four by the Congress of Deputies) and must be approved by a three-fifths majority vote.⁵⁹

In South Africa, meanwhile, which has been influenced by both the common- and civil-law traditions, there is a Judicial Service Commission (JSC) that integrates representatives from the legislature (ten total, six chosen by the National Assembly and four from the National Council of Provinces), the executive (five, four chosen by the president in consultation with all the party leaders represented in the National Assembly, plus the minister of justice), the judiciary (three, including the chief justice and the President of the Constitutional Court), and the bar (four practicing lawyers and one law professor).⁶⁰ The JSC prepares a list of nominees with three names more than the number of appointments to be made (whether to the Constitutional Court or any other court), and the president makes appointments from the list.⁶¹ The constitution stipulates that "[t]he need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed."⁶²

Even in NC countries of the common-law tradition, there is recognition of the need to attend to the representativeness of the high court. In Canada, for example, where the executive has control over all judicial appointments, there is, as Hirschl himself notes, "a provincially representative formula" for Supreme Court appointments,⁶³ guaranteeing three justices from Ontario, three from Québec, two from the western provinces, and one from the Maritime provinces.⁶⁴

57. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 32A(4); ANDRÁS KÖRÖSÉNYI, GOVERNMENT AND POLITICS IN HUNGARY 267 (English ed., CEU Press 1999).

58. KÖRÖSÉNYI, *supra* note 57, at 267.

59. C.E. [Constitution] art. 159(1); Heidi Beirich, The Role of the Constitutional Tribunal in Spanish Politics (1980-1995) (1998) (unpublished Ph.D. dissertation, Purdue Univ.).

60. S. AFR. CONST. 1996 § 178(1).

61. *Id.* § 174(4)(a).

62. *Id.* § 174(2).

63. HIRSCHL, *supra* note 2, at 80.

64. Supreme Court Act, R.S.C., ch. S-26, § 6 (1985).

Moreover, with the exception of Canada, in all of the systems just discussed, constitutional court judges do not serve for life. In Germany and South Africa, they serve twelve-year, nonrenewable terms;⁶⁵ in Italy and Spain, nine-year, nonrenewable.⁶⁶ In Hungary, the terms are nine years and renewable.⁶⁷ In addition, some countries have a mandatory retirement age for constitutional court judges: sixty-eight in Germany and seventy in both Hungary and South Africa.⁶⁸ Even Canada requires that its judges step down at seventy-five.⁶⁹ Thus, it is far less likely in these countries than it is in the United States (for example) that judges will be grossly out of step with the rest of the political system, representing perspectives that have been long since rejected by strong popular majorities.⁷⁰

As this small sampling of judicial appointment and tenure rules demonstrates, the degree of insulation or removal from politics that high court judges enjoy varies from country to country such that not all judges everywhere are equally unrepresentative or unaccountable. Granted, high court judges never have to answer directly to voters, and, even in the stingiest countries, they enjoy term lengths that elected officials can only dream about. However, the fact that they do not face elections is often considered enabling: because they don't have to cater to constituents with particular demands, they are freer to decide cases on principle than are legislators who must keep one eye always on the polls.⁷¹ While this cannot guarantee that judges will be better at defending certain values and principles than will legislators, it does mean that courts stand as "differently organized and differently responsive" fora.⁷² Their increased involvement in political life might thus offer opportunities, not just for traditional elites, but for a wide variety of citizens, to contribute to the "continuous process of

65. Gesetz über das Bundesverfassungsgerichts-Gesetz [Federal Constitutional Court Act], Mar. 12, 1951 BGBl.I at 243, § 4 (F.R.G.); S. AFR. CONST. 1996 § 176(1).

66. COST. art. 135 (Italy); C.E. [Constitution] art. 159(3) (Spain).

67. Act XXXII of 1989 on the Constitutional Court, art. 8(3) (1989).

68. KOMMERS, *supra* note 51, at 21; Act XXXII of 1989 on the Constitutional Court, art. 1a, 3; S. AFR. CONST. 1996 § 176(1).

69. Supreme Court Act, R.S.C., ch. S-26, art. 9(2) (1985).

70. See Steven G. Calabresi & James Lindgren, *Justice for Life? The Case for Supreme Court Term Limits*, OPINIONJOURNAL, Apr. 10, 2005, <http://www.opinionjournal.com/editorial/feature.html?id=110006539>.

71. CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 58-59 (2001); LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 212-13 (2004); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 740-42 (1995).

72. TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 233 (1999).

discussion and reflection about what democracy means and demands."⁷³

IV. HAVE JUDGES REALLY TAKEN OVER?

A second major assumption that Hirschl and other skeptical democrats make is that the undeniable increase in judicial involvement in political decisionmaking over the past several decades means that the direct representatives of the people, the elected legislators, have been increasingly sidelined. In this zero-sum view, one institution's gain is, by definition, another's loss, and, since it is the courts that have been gaining in influence, this means that "the persuasion of parliamentary (and public) debate" has been substituted by "the coercion of court orders"⁷⁴ and "the popular will" has been "systematically frustrate[d]."⁷⁵ Indeed, the very premise of Hirschl's book is that "[o]ver the past few years the world has witnessed an astonishingly rapid transition" to what he subsequently dubs a "new political order—juristocracy."⁷⁶

Once again, I submit that this is a perspective that those most familiar with the U.S. case might be willing to accept, but which doesn't apply equally to all NC countries. Because the U.S. Constitution is considered to be analogous to ordinary law,⁷⁷ it is often said to be "the province and duty" of the judiciary to say what it means,⁷⁸ and once the high court has spoken, the matter is settled, or so the Justices, and many of their supporters, would have it.⁷⁹ If instead the executive or the legislature had the power to overrule the Court, to assert an independent interpretation of the Constitution, the reason-

73. Allan C. Hutchinson, *The Rule of Law Revisited: Democracy and Courts*, in RECRAFTING THE RULE OF LAW 196, 218 (David Dyzenhaus ed., 1999) (internal quotation marks omitted). Scheppele offers evidence that this has been the case in at least two NC countries (Hungary and Russia). Kim Lane Scheppele, *Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe*, 18 INT'L SOC. 219, 232 (2003). Note that Hirschl's research design doesn't permit the testing of this hypothesis in his four cases because he measured outcomes in terms of success rates of negative versus positive rights claims, ignoring differences in the constitutional text, the nature of the parties that brought the claims (elite? non-elite?), and what the popular and legislative responses were to the decisions. See HIRSCHL, *supra* note 2, at 106 tbl.4.2.

74. MORTON & KNOPFF, *supra* note 6, at 155.

75. BORK, *supra* note 6, at 2.

76. HIRSCHL, *supra* note 2, at 1, 222. Bork, for his part, goes so far as to claim that "judges have wrought . . . a coup d'état." BORK, *supra* note 6, at 13.

77. GRIFFIN, *supra* note 44, at 13.

78. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

79. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997); see also KRAMER, *supra* note 44, at 221 (noting that judicial supremacy gained wide acceptance after the *Cooper* decision).

ing goes, then the Constitution's status as law would end, and there would be little point in having a written constitution.⁸⁰ This formulation, grounded in a strict law/politics distinction, grants supreme authority to the judiciary in constitutional decisionmaking and sets up the relationship between the judiciary and the legislature in binary and oppositional terms.

This is not exactly the way constitutionalism is conceived and practiced, however, in other polities.⁸¹ Indeed, some NC countries provide explicit and easy mechanisms for legislative override, meaning that if judges rule in a way deemed sufficiently outrageous to the simple legislative majority, they can be overruled. Section 33 of the Canadian Charter, for example, allows both provincial legislatures and the national parliament to declare that any of its acts or provisions "shall operate notwithstanding" most of the rights provisions in the Charter (exceptions are voting rights and election rules, mobility rights, linguistic rights, and federal guarantees).⁸² Under Section 4 of the 1998 Human Rights Act in Britain, which formally incorporated the European Convention on Human Rights into British law, judges can make a declaration of incompatibility against any act of parliament deemed to be in conflict with the European Court of Human Rights; however, per Section 10, the declaration has no effect on legislation unless the executive, with parliamentary approval, alters the law

80. *Marbury*, 5 U.S. (1 Cranch) at 177-78; Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 406 n.9 (2003).

81. And, indeed, an increasing number of scholars argue that this does not even accurately describe the U.S. system, whether in theory, in practice, or both. See, e.g., GRIFFIN, *supra* note 44, at 113-15 (describing how majoritarian pressures and public opinion influence Supreme Court decisions); KRAMER, *supra* note 44, at 227-33 (arguing that judicial supremacy prevails until judicial activism exceeds the inherent limits placed upon it by the majority); SAGER, *supra* note 71, at 224-25 (concluding that constitutional decisions made by courts do not compromise the democratic principles of the U.S. political justice scheme); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 646-48 (1993) (arguing that state legislatures may redefine, narrow, or challenge decisions by the Supreme Court by passing laws which tested the extent of constitutional protections); Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365, 383 (2001) (arguing that during reconstructive periods, the sphere of judicial review decreases and Supreme Court decisions become more deferential to the president and the majority's will).

82. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. Overrides may not be exercised regularly, but the fact that they are not indicates either that politicians don't see it in their interest to assert them (they would pay an electoral price for doing so) or that there are barriers to cooperation within the legislature, such that majority preferences are not getting translated into majority action in legislature. Such an inability to reach simple majority consensus itself problematizes the judicial-elite-minority/legislative-popular-majority assumption.

to achieve consistency.⁸³ In New Zealand (one of Hirschl's central cases!), under the 1990 Bill of Rights Act, judges have even less authority. While Section 6 states that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning,"⁸⁴ Section 4 of the Act explicitly prohibits judges from refusing to apply or otherwise rendering invalid or ineffective any law deemed to be in conflict with the bill of rights.⁸⁵

Hence, rather than playing a "trumping" function, asserting their superior position, and shutting out the legislature, high court judges in a number of NC countries might instead be viewed as participating in and (arguably) nurturing a polity-wide constitutional dialogue.⁸⁶ As a respected New Zealand legal scholar and high court judge puts it, "[w]e should not think of a Bill of Rights as simply requiring a choice between parliament and the courts or elected politicians and non-elected judges. We should see it as being directed at the lawmaking process as a whole and indeed as having a wider public and educational process."⁸⁷

Even in places where courts can seemingly trump legislatures on matters of constitutional interpretation, amendment requirements are often far more easily met than in the United States. As Stephen Griffin notes, the provisions for formal constitutional amendment laid out in Article V of the U.S. Constitution "comes close to requiring unanimity to approve any amendment as a practical matter."⁸⁸ This makes the U.S. Constitution arguably the most rigid in the world, thereby enhancing, at least in theory, judicial supremacy in the system.⁸⁹ Elsewhere, however, a determined legislative majority, or supra-majority, can far more easily assert its dominance should judges depart too much from an "acceptable" set of constitutional interpreta-

83. Human Rights Act, 1998, 42 Eliz. 2, c. 42, §§ 4, 10.

84. New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 6.

85. *Id.* § 4.

86. SWEET, *supra* note 2, at 193; Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures*, 35 OSGOODE HALL L.J. 75, 96-98 (1997); Hutchinson, *supra* note 73, at 218-19.

87. K.J. Keith, *The New Zealand Bill of Rights Experience: Lessons for Australia* 6 (June 21, 2002) (unpublished manuscript), http://www.gtcentre.unsw.edu.au/publications/papers/docs/2002/89_KennethKeith.pdf.

88. GRIFFIN, *supra* note 44, at 29.

89. There is, in some countries, the thornier issue of "unconstitutional constitutional amendments" (e.g., Germany, South Africa), which really does set constitutional court judges up as "guardians." As noted above, however, judicial selection and tenure rules render these judges less insulated from popular majorities than their counterparts in the United States. See *supra* notes 51-70 and accompanying text.

tions. In Israel, for example, the most entrenched of the Basic Laws require no more than a simple majority of the Knesset to change.⁹⁰ In Hungary, a one-time vote by two-thirds of the members of parliament is sufficient.⁹¹ In Italy, amendment can be achieved by two successive votes in parliament, separated by at least three months, requiring a simple majority in both houses.⁹² This may be followed by a popular referendum, unless the amendment passes by at least two-thirds approval in the second round, in which case a referendum is not necessary.⁹³ In Spain, three-fifths approval in both houses of parliament is required, with an alternative envisioned that encourages cooperation between them.⁹⁴ As in Italy, a referendum may be demanded by a parliamentary minority.⁹⁵ In short, the spread of bills of rights and judicial review over the past fifty years may have altered the relationship between legislatures and courts around the world, but the variation in the way this relationship is formally structured in different NC countries is striking and important. It is simply not accurate to claim that judges everywhere have eclipsed, or even have the formal potential to eclipse, legislators.

In sum, just as a slightly more detailed look at judicial selection and tenure rules weakens the claim that high court judges everywhere are insulated and unrepresentative, a brief consideration of the variation in the way the role of the high court is constructed and limited in different countries throws into doubt the notion that judges everywhere are brandishing constitutions to impose their will on legislative majorities.⁹⁶ Once again, a closer examination reveals an important

90. Basic Law: Freedom of Occupation, 1994, S.H. 90, § 7. Given the notorious fragmentation of the Israeli political system, this is much easier said than done, but it remains, nonetheless, a majoritarian rule.

91. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] art. 24(3).

92. COST. art. 138.

93. *Id.*

94. C.E. [Constitution] art. 167(1).

95. *Id.* at art. 167(3).

96. Indeed, a more accurate critique of NC judges might not be that they are frustrating/trumping majorities, but that they fail to protect minorities. If it is true, as Dahl notes, that because of the judicial selection process, the U.S. Supreme Court tends to reflect the interests of the dominant political coalition, the logic should apply even more strongly in many of the NC countries, where judicial tenure is shorter and judicial appointment more openly politicized/politically determined. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957). A rigorous comparative empirical analysis of how and why courts respond to rights claims by historically or structurally disadvantaged minorities versus how they respond to rights claims by social elites, like Marc Galanter's article, might be very revealing. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). However, evidence of failure to protect such minorities would not necessarily support the claim that democracy (majority rule) is losing ground to juristocracy; rather, it might well

degree of political embeddedness for courts. Judges with constitutional review power are not necessarily cast as guardians that stand outside of and above the democratic system, able to invoke their legal expertise to trump legislative majorities and cut off public debate. Rather, in numerous NC countries, institutional rules and mechanisms bring judges into direct contact and dialogue with both citizens and their elected representatives and clearly limit the ability of judges to dictate political outcomes. Courts in these countries might thus instead be viewed as “essential components of, rather than limitations on, democratic governance.”⁹⁷

V. CONCLUSION: BEYOND MANICHEANISM

Judicial review, once an institution unique to the United States, has now become a staple around the world, presenting American public law scholars with an unprecedented opportunity to test their arguments empirically.⁹⁸ To date, however, most authors have been content to make “simple, sweeping claims,”⁹⁹ whether positive or negative, about the effects of the new constitutionalism. Liberals have tended to celebrate the trend, while those more concerned about democracy have condemned it. In this Essay, I have sought to complicate the picture by bringing to light some of the variety in the way that the judicial role has been constructed in NC countries. In so doing, I hope to encourage scholars to move beyond the stark, essentializing claims of the established debate and to encourage inquiry into the different effects that this variation has on political practice.

Both sides in the existing debate tend to argue in dichotomous and/or essentialist terms. Either constitutionalization reflects a noble commitment to rights principles (the sunny liberal view) or it’s a crass power grab on the part of an elite minority (the skeptical democratic view). Either judges are heroic and principled, while legislators are venal and self-interested (the sunny liberal view); or judges are out-of-touch elites, while legislators are authentic representatives of the people (the skeptical democratic view). Public decisions are either legal, and therefore to be decided by judges, or political, and therefore only fair game for elected officials or the people themselves (both sides with different criteria). The involvement of judges in policymaking is either a boon for or a travesty of “true” democracy.

reveal the opposite: an inability on the part of courts to challenge dominant views and policies, revealing the ultimate triumph of politics over law (or power over principle).

97. Scheppele, *supra* note 73, at 236.

98. HIRSCHL, *supra* note 2, at 6.

99. *Id.* at 218.

My argument is that such binary thinking gets us nowhere. As I have shown above, in numerous NC countries, judges are neither separate from nor supreme over the political process, but are, in many and varied ways, embedded in and contained by that process. Hence we would be far better off attempting to build our arguments from the bottom-up, formulating hypotheses around the empirical variety (only some of which I have described above) and designing our research with an eye to testing for the effects of that variation. As Hirschl states in the conclusion to his book: "Judicial interpretation and implementation of constitutional rights depend to a large extent on the ideological atmosphere, specific institutional constraints, and economic and social meta-conditions within which they operate."¹⁰⁰ I could not agree more. So let's get down to the business of trying to determine which of these variables matter most.

100. *Id.*